



General Assembly

Distr.: General
10 May 1999
English
Original: French/Spanish

International Law Commission

Fifty-first session

Geneva, 3 May–23 July 1999

Second report on unilateral acts of States

By Victor Rodríguez Cedeño, Special Rapporteur

Addendum

Contents

	<i>Paragraphs</i>	<i>Page</i>
IV. Representatives of a State for the purpose of formulating unilateral acts	71–99	3
A. Draft article:		
Article 4. Representatives of a State for the purpose of formulating unilateral acts	71	3
B. Commentary	72–99	3
V. Subsequent confirmation of an act formulated without authorization	100–108	7
A. Draft article:		
Article 5. Subsequent confirmation of a unilateral act formulated without authorization	100	7
B. Commentary	101–108	7
VI. Validity of unilateral legal acts: expression of consent and causes of invalidity ...	109–141	9
A. Draft articles:		
Article 6. Expression of consent	109	9
Article 7. Invalidity of unilateral acts	109	9
B. Commentary	110–141	9



VII.	A comment on reservations and conditions in relation to unilateral acts and on the non-existence of unilateral acts	142-146	14
VIII.	Future work of the Special Rapporteur	147-150	15

IV. Representatives of the State for the purpose of formulating unilateral acts

A. Draft article

71. The Special Rapporteur proposes the following article:

"Article 4

"Representatives of a State for the purpose of formulating unilateral acts

"1. Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

"2. A person is also considered as representing a State for the purpose of formulating unilateral acts on its behalf if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes.

"3. Heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs are also considered as representatives of the State in relation to the jurisdiction of that conference, organization or organ."

B. Commentary

72. A treaty operation is by its very nature complex and differs from an operation involving unilateral acts of States. Adoption, a State's decision to consent to be bound by a treaty, international notification of that decision and entry into force are the fundamental stages of a treaty operation. In the sphere of unilateral acts of States, however, the formulation of such acts is based on the unilateral intention to make an engagement and acquire unilateral obligations at the international level. The formulation of the unilateral acts with which we are concerned could, in that sense, be regarded as less rigid.

73. The State is represented at the international level by the bodies competent for that purpose. International law determines the conditions under which these bodies can engage the State vis-à-vis other States or other subjects of international law and indicates the privileges and immunities necessary for the exercise of their international functions. Within its own sphere, domestic law regulates the respective jurisdictions.³³ The expression of a State's consent is, in fact, regulated by domestic law, while the effects of the legal act concluded or formulated would appear to be regulated by international law. It is important to underscore this point before examining the present article.

74. Unilateral acts must be performed (formulated) by a body qualified to act on behalf of the State in the sphere of international law, whether in general, in a particular sphere or in a given matter. In order for the act to comprise obligations for the State, the organ from which it emanates must have the power to engage the State at the international level.³⁴

³³ L. A. Podesta Costa and José María Ruda, *Derecho Internacional Público* (Buenos Aires, Tip. Editora Argentina, 1985).

³⁴ Krzysztof Skubiszewski, "Les actes unilatéraux des Etats", in *Droit international: bilan et perspectives*, vol. I (Paris, Pédone, 1991), p. 243, para. 47.

75. The structure of article 7 of the Vienna Convention on the Law of Treaties should guide the drafting of the present draft article on unilateral acts, taking into account certain peculiarities to which reference should be made. It should, of course, be stated that in the Vienna Convention, article 7, concerning full powers, was considered separately from article 46 (draft article 31) relating to the domestic legal provisions connected with the capacity to conclude treaties, and from article 47 (draft article 32) relating to the specific restriction of the power to express a State's consent, despite the fact that, as some members of the Commission noted at the time,³⁵ they were apparently closely related. In reality, as others indicated on that same occasion,³⁶ the questions involved were completely different: article 7 (draft article 4) deals with the powers of the negotiating body, while articles 46 and 47 (draft articles 31 and 32) refer to the validity of a treaty in the context of the capacity to conclude treaties, which is determined by domestic rules.

76. Admittedly, as noted earlier, a restrictive approach is called for where it is a question of unilateral acts of States, particularly with regard to their elaboration, interpretation and effects.

77. In the law of treaties, international engagements and the obligations flowing therefrom emerge from generally complex negotiations from which mutual benefits are derived. Generally speaking, the parties involved in such negotiations propose that reciprocity be applied with regard to such benefits. In the case of unilateral acts, the State which makes an engagement and assumes certain obligations adopts an act in whose formulation it alone participates. This makes it a particular act.

78. It should also be noted that the State has recourse to the modality of formulating unilateral acts, in particular, where circumstances so require, especially where a negotiation with one or more other subjects of international law seems difficult. This would appear to be the case with regard to the unilateral declarations formulated by the French Government in the *Nuclear Tests* cases which, moreover, form a whole, as the International Court of Justice stated. A similar situation arose in the case of the declarations formulated by nuclear-weapon States which contain negative security guarantees addressed to non-nuclear-weapon States.³⁷

79. States can be engaged at the international level only by their representatives, as that term is understood in international law, that is, those persons who by virtue of their office or other circumstances are qualified for that purpose.

80. In the case of unilateral acts it must first be recognized that, as in the law of treaties, heads of State, heads of Government and ministers for foreign affairs are presumed to be able to engage the State in its external relations, as confirmed by doctrine, international jurisprudence and the Commission itself at the time when it prepared the draft articles on the law of treaties.

81. In its 1966 report to the General Assembly, the Commission, in commenting on article 6 of the draft articles on the law of treaties which became article 7 of the Convention, stated that:

“Paragraph 2 sets out three categories of cases in which a person is considered in international law as representing his State without having to produce an instrument of full powers. In these cases, therefore, the other representatives are entitled to rely

³⁵ Statements by Messrs. Yasseen, Rosenne and Amado at the 780th meeting of the Commission on 10 May 1965. *Yearbook ... 1965*, vol. I, paras. 30, 32 and 54–55.

³⁶ *Ibid.*, statement by Mr. Ago, para. 60.

³⁷ See *supra*, note 11.

on the qualification of the person concerned to represent his State without calling for evidence of it.”³⁸

The qualification of such persons is inherent in their office, as accepted by doctrine and jurisprudence and in practice and embodied in the Vienna Convention of 1969, in the article referred to above.

82. The qualification of a State's minister for foreign affairs to engage the State at the international level has been confirmed not only by doctrine but by international tribunals, as in the *Legal Status of Eastern Greenland* case, for example, where the Permanent Court of International Justice stated that “a [verbal] reply ... given by the Minister for Foreign Affairs on behalf of his Government ... in regard to a question falling within his province, is binding upon the country to which the Minister belongs”.³⁹

83. The same statement is made with respect to the President and to the head of Government, or Prime Minister, who unquestionably have the capacity to engage the State without having to produce full powers. The International Court of Justice, in a case concerning the application of the Genocide Convention, confirmed that basic assumption of international relations when it stated:

“According to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations (see, for example the Vienna Convention on the Law of Treaties, Art. 7, para. 2 (a)).”⁴⁰

84. In addition to heads of State, heads of Government and ministers for foreign affairs, other high-ranking State officials can formulate unilateral acts and legally engage the State in spheres or specific areas of interest to the States concerned.

85. Owing to the technical character of certain questions, persons other than those mentioned above may be qualified to engage the State in those areas. As Cahier notes, such bodies are provided with full powers which allow other States to know that they have the capacity to engage the State which they represent.⁴¹

86. On several occasions, the Court has considered acts and patterns of conduct of State officials, adopting interesting positions regarding their representativeness. In the *Temple of Preah Vihear* case, for example, the Court considered certain acts emanating from certain officials in deciding to which State the temple belonged.⁴² In the *Gulf of Maine* case, the Court considered that a letter emanating from an official of the Bureau of Land Management of the Department of the Interior of the United States of America and relating to a technical question did not constitute an official declaration by the United States Government concerning its international maritime boundaries.⁴³

87. In the *Nuclear Tests* cases, the Court concluded that the statements made by the President of the French Republic

“and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute

³⁸ *Yearbook ... 1966*, vol. II (A/6309/Rev.1, part II), para. 38 (commentary on article 6, para. 4).

³⁹ *P.C.I.J.*, 1933, Series A/B, No. 53, p. 71.

⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary objections, Judgment, I.C.J. Reports 1996*, p. 622.

⁴¹ P. Cahier, loc. cit. (*supra*, note 8), p. 243.

⁴² *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, pp. 25 and 30–31.

⁴³ *Case concerning the delimitation of the maritime boundary in the Gulf of Maine area (Canada v. United States of America), Judgment, I.C.J. Reports 1984*, pp. 307–308, para. 139.

a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made."⁴⁴

88. There appears to be no doubt that in the sphere of unilateral acts there are certain high-ranking officials, other than the head of State or Government and the minister for foreign affairs, who are permanently qualified to engage the State in specific areas under their jurisdiction.

89. Without dispensing with the restrictive character that should be attributed to unilateral acts, it seems necessary for such officials to be able to represent the State in specific areas of international relations, as would be the case for national officials who participate in international negotiations concerning the exploitation and use of common spaces.

90. International practice has not been examined in great detail, much less systematically, in order to determine whether the acts of certain high-ranking officials can engage the State. It does not seem easy to determine whether States recognize, at least in the treaty sphere, that a State acquires engagements through the formulation of acts other than an agreement signed by persons qualified in accordance with the Vienna Convention of 1969.

91. As the Commission has noted, confidence in international relations is undoubtedly crucial to the maintenance of harmonious relations and international peace and security. The declarations which officials make in given areas should guarantee to the one or more other subjects of international law to which they are addressed the necessary confidence in their mutual relations.

92. In that connection, the representatives whom the States concerned recognize as their representatives in given areas can engage the State. In view of the restrictive character of unilateral acts, referred to above, this should exclude acts performed by officials who do not have such capacity. It can then be accepted that representatives of a State at a given level and in given areas can engage the State by virtue of such permanent inherent capacity. This would be the case for high-ranking officials, namely, ministers and special technical representatives in given areas, which might include ministers or high-ranking officials taking part in negotiations involving a common interest, such as common spaces and resources.

93. This is perhaps one of the crucial questions that should be decided in order to identify persons qualified to engage the State in its external relations and to acquire obligations on behalf of their State. While certain persons can be considered as falling into this category, it is also necessary to exclude those not considered to have the permanent inherent power mentioned earlier.

94. In foreign affairs, officials of technical ministries generally exercise powers relating to their spheres of jurisdiction (foreign trade, transport and communications, health, labour, and so on). In short, many State organs now participate in the conduct of foreign affairs, and this situation is necessarily reflected in the sphere of unilateral acts.⁴⁵

95. The principle of good faith is important with respect to acts formulated by persons who are understood to be inherently qualified to engage the State. According to Skubiszewski, except in cases where there is a blatant violation of domestic norms involving a fundamental rule, the addressee of the unilateral act can invoke the principle of good faith in considering the State organ to be qualified.⁴⁶

⁴⁴ See judgments cited (*supra*, note 11), *Australia v. France*, para. 49, and *New Zealand v. France*, para. 51.

⁴⁵ Skubiszewski, *op. cit.* (*supra*, note 34), p. 243.

⁴⁶ *Ibid.*

96. Following the structure of article 7 of the Vienna Convention of 1969, the present draft article provides that representatives of a State to another State or to an international organization with which their State maintains relations and representatives of a State to a conference, as well as certain persons, would be qualified to engage the State if it appears from the practice of the States concerned or from other circumstances that the intention of those States was to consider those persons as representing the State for such purposes.

97. A different approach should be taken to the question of full powers in the case of unilateral acts than in the case of the law of treaties. It is true that the State grants full powers to certain persons to enable them to represent it in concluding a treaty, that is, to empower them so that they may therefore be competent to engage the State in a given negotiation. In the context of unilateral acts, however, full powers should be understood in a different sense. They would not be extended in order to enable a person to represent the State in the elaboration of a treaty, but rather to enable a person to act in a broader context, that is, either within or outside the framework of a negotiation, but in any case in relation to a given question. The State would implicitly grant permanent full powers to an official to enable him to conduct foreign affairs on a given issue.

98. While in the law of treaties the extension of full powers is essential in certain cases in order to be able to engage the State, in the sphere of unilateral acts it does not appear to be necessary to refer to such powers.

99. As stated, the circumstances in which a unilateral act is formulated, the form it takes (generally speaking, a declaration) and the obligations that flow from it differ substantially from a treaty operation. The specific nature of the unilateral acts that the Commission is now studying means that full powers need not be considered as part of the qualification of persons who are able to represent or act on behalf of the State.

V. Subsequent confirmation of an act formulated without authorization

A. Draft article

100. The Special Rapporteur proposes the following article:

"Article 5

"Subsequent confirmation of a unilateral act formulated without authorization

"A unilateral act formulated by a person who cannot be considered under article 7 as authorized to represent a State for that purpose and to engage it at the international level is without legal effect unless expressly confirmed by that State."

B. Commentary

101. Article 7 of the Vienna Convention on the Law of Treaties specifies the persons qualified to engage the State at the international level because of their office, because such qualification results from practice or because full powers have been assigned to them for that purpose, as referred to above, with the exception of the full powers that would not appear to be necessary in the context of unilateral acts of States.

102. Article 8 of the Vienna Convention of 1969 raises the possibility that a State can subsequently confirm, implicitly or explicitly, an act relating to the conclusion of a treaty when the act is performed by a person other than the persons mentioned in article 7 of the Vienna Convention of 1969.

103. When the draft articles on the law of treaties were elaborated, major questions were raised in the Commission concerning the link between international and domestic law. The conclusion was reached that the elaboration of the act was governed by domestic law, although its formulation was of interest to international law. In the sphere of unilateral acts, the principles and concepts underlying the Vienna Convention of 1969 continue to apply, although, as stated earlier, the question should be examined from a more restrictive standpoint, given the special characteristics already mentioned of this category of legal acts of States.

104. Two different situations should be envisaged in relation to such acts: (1) where the act is formulated by a person not qualified to engage the State, and (2) where, although the act is formulated by a person qualified to represent the State in the international sphere, his actions exceed his jurisdiction. While these are two different situations, the basic issue is the same: the actions of a person not qualified to engage the State in the formulation of a given act.

105. When the draft articles on the law of treaties were discussed in the Commission, one member indicated that the validity of an act formulated by an unqualified body was doubtful; nevertheless, if neither the executive body nor the parliament expressed disagreement immediately after receiving information about the treaty, it was implicitly confirmed.⁴⁷ There would appear to be a greater need for that rule in the law of treaties than in the context of unilateral acts of States.

106. During the Vienna Conference a draft amendment⁴⁸ was submitted which stated that an act relating to the conclusion of a treaty, executed by a person who could not be considered under article 6 as authorized to represent a State for that purpose, would have effect only if it was subsequently expressly confirmed by that State. As the proposal was rejected, the issue was resolved, and it was decided that the act could be confirmed both implicitly and explicitly, as provided in article 8 of the Convention.

107. In the context of unilateral acts it would seem appropriate, given their characteristics, that they be expressly confirmed if they are to have legal effect. This further guarantees the real intention of the State which formulates the act, affording greater security in international relations, an aim that is still the basis for the elaboration of the present draft articles. The express nature of the confirmation undoubtedly avoids misunderstandings as to the will of the State which formulates the act. To be sure, a revocable act cannot be confirmed if not expressly, as a representative rightly indicated at the Vienna Conference of 1969.⁴⁹

108. The draft article being commented on here states also that it is referring to a person not authorized "to engage the State at the international level". This is not the case with respect to the Vienna Convention of 1969, although it can be inferred.

⁴⁷ Statement by Mr. Verdross at the 674th meeting of the Commission on 7 May 1963. *Yearbook ... 1963*, vol. I, para. 7.

⁴⁸ A/CONF.39/C.1/L.69, submitted by Venezuela.

⁴⁹ Mr. Carmona, the representative of Venezuela, speaking at the 14th meeting of the Vienna Conference on the Law of Treaties, Vienna, 5 April 1968.

VI. Validity of unilateral legal acts: expression of consent and causes of invalidity

A. Draft articles

109. The Special Rapporteur proposes the following draft articles:

"Article 6

"Expression of consent

"The consent of a State to acquire an obligation by formulating a unilateral act is expressed by its representative when making an unvitiated declaration on behalf of the State with the intention of engaging it at the international level and assuming obligations for that State in relation to one or more other subjects of international law."

"Article 7

"Invalidity of unilateral acts

"A State may invoke the invalidity of a unilateral act:

- "1. If the expression of the State's consent to formulate the act was based on an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;
- "2. If a State has been induced to formulate an act by the fraudulent conduct of another State;
- "3. If the expression of a State's consent to be bound by a unilateral act has been procured through the corruption of its representative directly or indirectly by another State;
- "4. If the expression of a State's consent to be bound by a unilateral act has been procured by the coercion of its representative through acts or threats directed against him;
- "5. If the formulation of the unilateral act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;
- "6. If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;
- "7. If the expression of a State's consent to be bound by a unilateral act has been in clear violation of a norm of fundamental importance to its domestic law."

B. Commentary

110. The Commission, in its report submitted to the General Assembly in 1998, stated, in relation to the future work of the Special Rapporteur: "He could also proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions

of validity of the unilateral acts [declarations] ⁵⁰ During the discussion of the report of the Commission on this topic in the Sixth Committee in 1998, some representatives also suggested that the Commission should concentrate in the future on questions relating to the elaboration and conditions of validity of unilateral acts.⁵¹

111. Generally speaking, in order for a legal act to be valid in international law and to have legal effect, certain conditions must be met. First, the act must be attributable to a subject of international law and the representative of the State concerned must have the capacity to represent it, that is, be qualified to engage the State at the international level. As indicated above, this is regulated by domestic legal norms, particularly constitutional norms, a question that was considered when draft articles 3 and 4 were commented on.

112. As in the law of treaties, the source of unilateral acts of States resides in the expression of will, which must be free of irregularities. As is well known, a legal act can have effect only if it is valid. In case of invalidity, a unilateral act can be declared void and will therefore be without legal effect, as stipulated in article 69, paragraph 2, of the Vienna Convention, relating to the consequences of invalidity of a treaty.

113. The expression of will must also be formulated in the proper manner, at least by the one or more subjects of international law who are its addressees or beneficiaries. This is related to its public character (although for some, this would be related to proof of the existence of the act and not to its existence *per se*).

114. Moreover, in order for the act to be legally valid and to have legal effect, its object must be lawful. This is related to acceptance of the existence of international public order and to preemptory or *jus cogens* norms, as we shall see below.

115. Without doubt, the lawful object of unilateral legal acts of States must be consistent with the norms of so-called international public order, or, as Georges Scelle calls it,⁵² international common law, in order for such acts to be considered valid and, consequently, to have legal effect. It should be stated that the literature is not entirely consistent in accepting the existence of a higher legal order. Thus, Rousseau, for instance, in indicating that the requirement that the act be lawful occupies only a secondary place in the theory of international law, notes that "international law is intrinsically valid without any reference to a higher, metalegal or extralegal order".⁵³

116. Moreover, in order for a unilateral legal act of a State, in particular, to be valid, it "must always be in conformity with the fundamental rules of international law applicable to the matter under consideration ... Unilateral acts may not derogate from general international law, much less from the obligations assumed by their authors."⁵⁴

117. The expression of will by the author of the legal act is, as stated, essential to the creation of the act and to the effects which the act is intended to produce. The expression of will is so important that a portion of the literature defines a legal act as an expression of will, which vindicates the importance attached to irregularities capable of invalidating it, and to the interpretation of the act.

⁵⁰ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10)*, para. 200.

⁵¹ Statements by the representatives of Austria (A/C.6/53/SR.15, para. 10) and Romania (A/C.6/53/SR.18, para. 3).

⁵² Georges Scelle, *Précis de droit des gens, principes et systématique*, vol. II (Paris, Recueil Sirey, 1934), pp. 15 et seq., cited in Pellet and Daillier, *op. cit.* (*supra*, note 15), p. 200.

⁵³ Charles Rousseau, *Droit international public*, vol. I (Paris, Recueil Sirey, 1971), pp. 142-143.

⁵⁴ Skubiszewski, *op. cit.*, p. 242.

118. In the context of the law of treaties, the means of expressing consent to be bound by a treaty are set out in articles 11 et seq. of the 1969 Convention. They provide that a State can express its consent by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or any other means which States may deem appropriate.

119. The question of expression of will in the case of unilateral acts of States is also essential. What is fundamental here is the moment of expression, that is, the moment when the author, by means of a declaration, expresses his intention to make an engagement and acquire obligations. The moment should, of course, be viewed in a broad sense and be equated with the process of formulation, the context. This is consistent with the rules of interpretation accepted and reflected in the Vienna Convention of 1969.

120. The expression of will and the intention of the State to make an engagement and acquire obligations are inseparable. The representative of the State can express a will on its behalf with the intention of engaging the State at the international legal level, for otherwise we would be dealing with acts which should be excluded from the scope of our study, as noted on several previous occasions.

121. Intention is fundamental to the interpretation of the State act. It should be noted that, while the 1969 Convention states that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, such terms should be given a special meaning if it is established that the parties so intended.⁵⁵ This question will, however, be addressed at a later stage.

122. The expression of will demonstrates the author's intention to create a legal obligation. As Jacqué rightly states, if this intention does not exist, there is no legal act.⁵⁶ The author of the act must express the intention to assume an obligation vis-à-vis the addressee.

123. On several occasions, the International Court of Justice has considered intention, as a universally recognized basic principle applicable to both domestic and international law,⁵⁷ to be the fundamental element of interpretation. In the *Nuclear Tests* case, the Court stated that

"When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, ... is binding."⁵⁸

Further in that same decision, the Court stated:

"Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made."⁵⁹

124. It may be said that we are in the presence of a will to create a legal act

"dès lors que l'objectif à atteindre par le destinataire de l'acte est suffisamment précis de telle sorte que l'on puisse identifier tout comportement qui ne se conformerait pas

⁵⁵ Vienna Convention on the Law of Treaties of 1969, art. 31.

⁵⁶ Jean-Paul Jacqué, *Eléments pour une théorie de l'acte juridique en droit international public* (Paris, LGDJ, 1972), p. 121.

⁵⁷ *South West Africa* cases, separate opinion of Judge Van Wyk, *I.C.J. Reports* 1966, pp. 84-85; *Barcelona Traction* case, *I.C.J. Reports* 1964, p. 123; *Norwegian Loans* case, *I.C.J. Reports* 1957, p. 7.

⁵⁸ *I.C.J. Reports* 1974, p. 267, para. 43.

⁵⁹ *Ibid.*, p. 269, para. 49.

à la norme. C'est à cette condition que l'on se trouve devant une norme juridique et non un simple désir politique."⁶⁰ (once the goal to be attained by the addressee of the act is sufficiently clear that any conduct not consistent with the norm may be identified. This is the circumstance in which a legal norm exists, not merely a political desire.)

125. The intention to make an engagement must be clear and unequivocal, and must also be formulated, as we shall see, in the proper manner. Intention is a term

"dont il est fait usage à propos de l'interprétation des actes juridiques et qui désigne ce que l'auteur ou les auteurs d'un acte ont eu réellement en vue de convenir, de faire, d'obtenir ou d'éviter, que cela soit révélé par l'acte lui-même ou par d'autres éléments".⁶¹ (which is used in connection with the interpretation of legal acts and which designates what the author or authors of an act really intended to agree on, do, obtain or avoid, whether this is shown by the act itself or by other factors.)

126. It should also be noted that lack of clarity does not signify lack of intention, a point that is directly related to the degree of obligation, if that term is acceptable. Once again the question arises of the nature of the obligation, that is, whether the obligation involved is one of behaviour or conduct or one of result, a point that the literature discusses in depth.⁶² The question of international obligations is examined in great detail by the Commission in connection with the topic of international responsibility, which has an important relationship to the law of treaties and the law of unilateral acts, particularly where the State's conduct differs from what is required under the obligation it assumes by means of some unilateral acts.

127. These obligations can be obligations of conduct, that is, those which determine the behaviour or conduct which the State must assume, without prejudging the outcome. On the other hand, they can be obligations of result, which leave the State free to choose the means it will use to obtain the result in question.

128. The intention, which must always be clear if it is to be the basis of the engagement made by the State, may be express or implicit, a question that is for the body charged with its interpretation to determine. In that connection, we should recall the judgments rendered by the International Court of Justice in the *Nuclear Tests* cases, in which the Court concluded that the intention of the declarant State was to legally bind itself at the international level.

129. The expression of consent must be free of irregularities, as stipulated expressly in articles 48 to 52 of the Vienna Convention of 1969.

130. The question of the validity of a legal act requires us to examine the regime governing the invalidity of legal acts in international law, which is essential in order to determine the validity of the act and its legal effect.

131. Without doubt, the rules applicable to treaty acts are largely applicable to unilateral legal acts of States. For this reason, the comments on the present draft article should take into consideration the rules laid down on the subject in relation to treaty acts, with special reference to treaties under the 1969 Convention.

⁶⁰ Jacqué, *op. cit.*, p. 127.

⁶¹ *Dictionnaire de la terminologie internationale de Jules Badesvart* (Paris, Recueil Sirey, 1960), p. 341.

⁶² See, for example, Paul Reuter, "Principes de droit international public", *Recueil des cours* ..., vol. 103, (1961-II), p. 472.

132. In the case of unilateral acts, error, fraud, corruption of the State's representative, violence committed against the State or its representative and the peremptory norms of international law or *jus cogens* should also be taken into account in this sphere, although probably under different circumstances, depending on the specific nature of such acts.

133. In the first place, a State may invoke the invalidity of a unilateral act where the act has been formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time of its formulation, if it formed an essential basis of its consent. This question was discussed extensively when the Vienna Convention on the Law of Treaties was being drafted.

134. A State may not invoke an error of fact if it contributed by its conduct to the error, as stipulated in article 48, paragraph 2, of the Vienna Convention. The International Court of Justice has in the past considered this to be a well-established principle of international law.⁶³

135. Moreover, as in the 1969 Convention, a State may invoke the invalidity of an act if it has been induced to formulate the act by the fraudulent conduct of another State. In spite of the rarity of such a situation in a treaty context⁶⁴ and the doubts expressed by the Special Rapporteur, Sir Humphrey Waldock, as to whether fraud should be included as a cause of invalidity of a treaty, the Convention includes it in article 49. The Special Rapporteur indicated at the time that he had doubts as to whether fraud could occur in a treaty context. While the possibility existed, there had never been a specific instance of its having induced a State to consent to a treaty.⁶⁵

136. In spite of certain misgivings, fraud should be included in the present draft article as a cause of invalidity. If the situation can arise in a treaty context, then it can also arise in the context of the formulation of a unilateral act. Fraud can even occur through omission, as when a State which has knowledge of certain realities does not convey it, thus inducing another State to formulate a legal act.

137. A State may invoke invalidity of a unilateral act if the act has been formulated by means of corruption of or violence against the State's representative or a threat directed against the State by one or more other States. Undoubtedly, such causes of invalidity, provided for in the Vienna Convention of 1969, are also applicable to unilateral acts of States. In all such cases, the acts formulated are void, which also raises the question of whether these acts are absolutely or relatively void.

138. A unilateral act is also void if it is formulated under the threat or use of force in violation of the principles of the Charter of the United Nations, a question that was raised in the same terms in the 1969 Convention.

139. A unilateral act is also void if it is contrary to a State's own previous norms or to a peremptory or *jus cogens* norm, the latter being understood as a norm accepted and recognized by the international community, as stated in the 1969 Convention. This definition gave rise to an interesting doctrinal debate.

140. Some norms of international law may be derogated from by the parties; this is accepted under international law. It is also accepted, however, that some of these norms may not be derogated from. It is beyond all doubt that such norms, while difficult to identify, have emerged gradually, with benefits for the organization of international society, since the

⁶³ *Case concerning the Temple of Preah Vihear*, I.C.J. Reports 1962, p. 26.

⁶⁴ Charles E. Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Sirey, 1970), p. 147.

⁶⁵ See *Yearbook ... 1963*, vol. I, 678th meeting, p. 29.

question was first raised at the time of the elaboration of the Vienna Convention on the Law of Treaties. At issue is the distinction between norms of *jus dispositivum* and of *jus cogens*. The latter are a constraint on the capacity to formulate unilateral legal acts; this would include some norms deriving from the Charter of the United Nations and others contained in basic conventions, such as those relating to slavery and genocide, among many others. These are peremptory norms of general international law which admit of no exceptions.⁶⁶

141. Lastly, the fact that an act as formulated may be contrary to domestic legal norms — specifically, constitutional norms — may invalidate it if the State invokes its invalidity. There can be no doubt that the rule set out in article 46 of the Vienna Convention of 1969 is fully applicable to unilateral acts. The State representative, as indicated above, should be qualified to represent the State in its international relations, and, furthermore, the act formulated may not be contrary to constitutional norms. Indeed, the representative who formulates the act must act within his sphere of jurisdiction if the act is to have legal effect.

VII. A comment on reservations and conditions in relation to unilateral acts and on the non-existence of unilateral acts

142. The formulation of reservations and the laying down of conditions are possible in the treaty sphere. This would not, however, appear to be the case in the sphere of unilateral acts of States.

143. While it is true that a State can formulate reservations or certain conditions when performing a unilateral act, in such cases we would no longer be dealing with an autonomous unilateral act of the kind that is of interest to the Commission at present. By their very nature, such unilateral acts would have to take place within the treaty sphere. Indeed, once the acceptance of reservations or conditions comes into play, such acts are no longer autonomous in the sense in which the term is understood in the present draft. The necessity of acceptance of reservations or conditions by the addressee State turns such acts into treaty acts. The question is important; however, it was deemed advisable not to adopt a definitive position on it until the Commission has concluded its consideration of reservations, a topic which is being studied separately.

144. Another important question which arises in connection with the law of unilateral acts and which should be examined in the present draft relates to the non-existence of the act. The issue is not whether an act is valid or invalid or whether it can or cannot be invalidated for the reasons set forth above.

145. The question of the object of treaties should be viewed from two angles: first, with regard to the lawfulness of the object, which is related to the question of invalidity, and secondly, with regard to the existence of the object. A unilateral act is simply non-existent if its object does not exist.

146. It should also be stated that an act is non-existent if not formulated in the proper manner. This question is inherent in the very existence of the act, although, admittedly, it can strengthen the evidence that such an act has been formulated. An act performed in secret may have no legal force. In order for such an act to have legal effect, the addressee or beneficiary State or States must necessarily be aware of it. As Sicault notes, "[this] is a prerequisite, for, so long as a subject of law keeps a unilateral engagement to itself, it can

⁶⁶ Ibid., statement by Roberto Ago, p. 70, para. 74.

modify it as it wishes".⁶⁷ We should state at the outset, however, that this question has certain restrictions in the context of unilateral acts of States.

VIII. Future work of the Special Rapporteur

147. If the Commission so decides, the Special Rapporteur could elaborate and address in a third report all questions relating to the observance, application and interpretation of unilateral acts, as well as the question of whether the author of an act can amend, revoke or suspend the application of such acts, thus following the recommendations submitted by the Working Group in 1997.

148. In relation to observance, a provision should be elaborated on *acta sunt servanda*, as referred to in the first report, in which the binding nature of such State acts was examined.

149. As regards application, such questions as the non-retroactivity and the territorial scope of unilateral acts, and the relationship between a unilateral act and obligations previously assumed by the State formulating the act, could be addressed.

150. In addition, all questions relating to the interpretation of such acts — following to a large extent the general rules applicable to treaty acts and the question of whether and under what circumstances a State can modify, amend or revoke unilateral acts (a question which differs substantially from those raised by the law of treaties) — could be addressed.

⁶⁷ Sicault, *op. cit.* (*supra*, note 25), p. 671.